STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 3, 2010
v	No. 291235 Wayne Circuit Court
TIMOTHY WAYNE GRANDBERRY, Defendant-Appellant.	LC No. 08-010952-FH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent because I believe that the trial court, sitting as the finder of fact, considered inadmissible hearsay evidence and that consideration of this evidence was not harmless error.

Defendant was convicted of possession of heroin with intent to sell, as well as felony firearm and felon in possession of a firearm. The heroin was found in the basement chimney in a house where several people resided and where several people were present at the time of the police raid. The police officers testified that upon entry into the house, they found defendant sitting in the basement at a table containing what appeared to be drug residue and that a rifle was located not far from the table. Defendant told them that there were drugs located in the chimney. This was the extent of the admissible evidence against defendant. Defendant apparently also told the police that the drugs belonged to someone named Tom, but this exculpatory statement was excluded as hearsay.

Contrary to the police testimony that defendant was in the basement when they arrived, the defense presented two witnesses who testified that they were present in the house at the time of the raid, and that when the police entered the home, defendant was on the first floor and was asked by the police to go with them to the basement so that they could question him privately. If these witnesses were believed, then the only evidence linking defendant to the gun and the drugs was his knowledge of the drugs' location. No drugs or weapons were found in defendant's personal possession and there was no testimony that anyone had ever seen him in possession of either or that he had ever been seen selling drugs.

However, there was also non-admissible evidence that suggested defendant's guilt. The search warrant was based on information from a confidential informant that heroin was being sold out of this house and giving a description of the alleged drug seller. In setting forth its

conclusions when it convicted defendant, the trial court stated, "it's apparently also true that the defendant, the defendant met the description or fit the description of a person who was named in the warrant." I agree that the fact that defendant fit the description of the alleged dealer, particularly when combined with the admissible evidence, is significant evidence of guilt. However, the prosecution elected not to call the confidential informant as a witness. We do not know why the prosecution made that choice, but given that the effect was to deny the defense an opportunity to cross examine him, we should presume that the purpose of not calling him as a witness, particularly where his testimony, on its face, would have been so helpful to the prosecution, was to avoid cross examination that may have demonstrated that the description was unreliable or false.

The trial court, after referencing the hearsay description and that defendant fit the description, attempted to explain that it was not considering the hearsay evidence as evidence of guilt, but only as evidence that the police had a good faith basis to believe that out of everyone in the house, the most likely suspect was defendant. However, evidence that the police had good reason to think someone was guilty is by definition evidence of guilt. Moreover, the question of "good faith" suggested by the trial judge as a concern was never at issue in the trial. There was no challenge to the search warrant or whether there was a good faith basis for it. The majority observes that defendant's resemblance to the description "was an indication that the officers did not arbitrarily target him, which supported an inference that they did not have a motive to lie about where defendant was and what he said and did during the raid." However, the defense did not assert that the police officers had a grudge or personal animus against defendant, and whether defendant fit the hearsay description is irrelevant as to which floor of the house he was on when the police entered. The fact that defendant fit the description, contrary to the trial court's and the majority's suggestions, does not increase the likelihood that the officers testified accurately and truthfully about his whereabouts in the house. Indeed, if we must consider how the hearsay description impacts credibility, I would think it more readily supports the defense witnesses because, having reason to suspect defendant based on the description, the officers may have taken him to the basement to question him privately.

This was not an open and shut case. It is certainly possible that someone living in a house may know where some other resident hides drugs. It is, of course, surely possible that the drugs belonged to defendant. However, in a case where the defendant did not have the drugs or weapon on his person and there were no witnesses who testified that the drugs or the weapon belonged to the defendant or that he had ever been seen in possession of them, I believe we should be cautious in concluding that the trial court's specific reference to the matching hearsay description did not play a meaningful role in the conviction. Accordingly, I would reverse and remand for a new trial.

/s/ Douglas B. Shapiro